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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DANIEL MERCED FLORES, Petitioner.	2 CA-CR 2009-0408-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20013611

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Jill E. Thorpe — Tucson
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Following a jury trial, Daniel Merced Flores was convicted of first-degree murder, conspiracy to commit first-degree murder, and kidnapping. The trial court sentenced him to concurrent terms of natural life on the murder charge, life without possibility of release for twenty-five years on the conspiracy charge, and 10.5 years for

kidnapping. This court affirmed his convictions and sentences on appeal. *State v. Flores*, No. 2 CA-CR 2002-0407 (memorandum decision filed Oct. 21, 2004). Flores filed a petition for post-conviction relief alleging a claim of ineffective assistance of counsel, relying on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), and newly discovered evidence pursuant to Rule 32.1(e), Ariz. R. Crim. P. The trial court held an evidentiary hearing on both claims pursuant to Rule 32.8. The court denied relief after the hearing, and this petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.2d 945, 948 (App. 2007). Finding none, we deny relief.

¶2 As he did below, Flores first contends he received ineffective assistance from his trial counsel, leading him to reject a favorable plea offer from the state. "To prove ineffective assistance of trial counsel, a petitioner must show both deficient performance and prejudice." *Donald*, 198 Ariz. 406, ¶ 15, 10 P.3d at 1200; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant may show deficient performance during plea negotiations by proving counsel erroneously advised the defendant or "failed to give information necessary to allow [the defendant] to make an informed decision whether to accept the plea." *Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. Under *Donald*, "[t]o establish prejudice in the rejection of a plea offer, a defendant must show 'a reasonable probability that, absent his attorney's deficient advice, he would

have accepted the plea offer' and declined to go forward to trial." *Id*. ¶ 20, *quoting People v. Curry*, 687 N.E. 2d 877, 888 (Ill. 1997).[1]

¶3 Flores argued below that his trial counsel had not sufficiently explained to him the risk that, should he be found guilty at trial on the murder charge, he could be sentenced to a term of natural life in prison. He claimed he believed the maximum possible sentence for such a conviction was "twenty-five to life in prison" and asserted he would have accepted the plea offer had he been correctly informed.

¶4 The trial court determined, however, based on trial counsel's testimony at the evidentiary hearing, that counsel had thoroughly and accurately explained both the benefits of the plea offer and the risks involved in going to trial, including Flores's exposure to a possible sentence of natural life in prison. Specifically, the court found, "[I]t is [counsel's] practice to apprise a client of the full possible range of sentencing, which here, included exposure to natural life." Counsel had also testified that Flores had been "adamant that he was not guilty and we [would] go to trial." In denying relief, the court noted the following, suggesting it also believed Flores would not have accepted the plea offer in any event:

> Counsel testified that, initially, he believed the case to be defensible. However, after [certain] evidence . . . came to light, he believed his chances of winning at trial to have been significantly lessened, and testified he would have communicated this to his client. [Counsel] testified that his

[1]Because Flores has not proven the facts necessary for his *Donald* claim, we need not re-examine that case's validity. *See State v. Vallejo*, 215 Ariz. 193, ¶ 10 & n.4, 158 P.3d 916, 919 & n.4 (App. 2007) (Howard, J. specially concurring); *see also State v. Jackson*, 209 Ariz. 13, ¶ 4, 97 P.3d 113, 115 (App. 2004) (noting that this court's detailed discussion of *Donald* did not imply adoption or approval of that decision).

> client never wavered from his stance that he wanted to go to trial, and that not even discussion alone with his mother and grandmother—both of whom wanted him to take the plea—changed his mind.

The court also stated that, although Flores testified he "could not recall telling [trial counsel] that he believed that he would win on the murder case, . . . he did not deny making such a statement."

¶5 Flores had the burden of proving his factual allegations by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(c). And the trial court was "the sole arbit[er] of the credibility of witnesses" at the evidentiary hearing. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). The court's factual determinations were supported by the evidence, and we find no abuse of discretion in its denial of relief on this claim.

¶6 Next, Flores contends the trial court erred in denying his claim that newly discovered evidence exists that likely would have changed the outcome at trial. In his petition for post-conviction relief, Flores had claimed that his two co-defendants, who had implicated Flores at trial, had recanted their testimony. He attached to his petition transcripts of statements the co-defendants had given to a defense investigator that supported his claim, a letter ostensibly written by one of them to Flores, and statements and affidavits from various inmates claiming one of the co-defendants had admitted lying about Flores's involvement in the case. At the evidentiary hearing, however, the co-defendants refused to testify about their post-trial statements, invoking their constitutional rights under the Fifth Amendment. One of the two testified that his trial testimony had been truthful. And the trial court precluded on hearsay grounds evidence

of the co-defendants' alleged post-trial recantations, finding their statements and those of the other inmates were not excepted from the rule against hearsay pursuant to Rule 804(b)(3), as Flores had urged.

¶7 On review, Flores challenges primarily the trial court's evidentiary ruling. But we need not address that issue. To be entitled to relief based on newly discovered evidence, a defendant has the burden of showing that such evidence probably exists and likely would have changed the outcome of the case. *See State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). The recantation of testimony after trial may constitute "newly discovered material facts." *See State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982). But recanted testimony is considered "inherently unreliable," *id.*, and "[c]ourts have long been skeptical of recanted testimony claims." *Krum*, 183 Ariz. at 294, 903 P.2d at 602. Thus, assessment of the "credibility of the recanted evidence is a controlling factor which can best be [determined] in the court that heard the original testimony." *State v. Sims*, 99 Ariz. 302, 310, 409 P.2d 17, 22 (1965). On review, "we give particular weight to the trial court's judgment in cases involving recanted testimony." *Krum*, 183 Ariz. at 293, 903 P.2d at 601. Moreover, indirect evidence of recantation, "standing alone . . . will seldom entitle a Rule 32 petitioner to relief." *Id.*

¶8 In this case, given the co-defendants' refusal to testify at the evidentiary hearing in conformance with their post-trial statements, evidence of those statements would be merely impeaching. *See id.* n.7; *see also* Ariz. R. Crim. P., 32.1(e)(3) (newly discovered material facts may not be "merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of

critical significance at trial"). And, in the course of its evidentiary ruling precluding the recantation evidence, the trial court clearly determined the evidence was not credible, a determination it was in the best position to make. We find no abuse of discretion in the court's denial of relief on this claim.

¶9 Accordingly, although we grant Flores's petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge